No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Executive Branch unilaterally created a program that will grant "lawful presence" and eligibility for a host of benefits to over four million aliens present in this country unlawfully. This program, which is called DAPA, goes far beyond prioritizing which aliens to remove.

The district court entered a preliminary injunction of DAPA under the Administrative Procedure Act, and the court of appeals affirmed. Both courts explained that the injunction does not require the Executive to remove any alien and does not impair the Executive's ability to prioritize aliens for removal. Indeed, on the same day it announced DAPA, the Executive issued a separate memorandum defining categories of aliens prioritized for removal. This lawsuit has never challenged that separate memorandum.

The questions presented are:

1.a. Whether at least one respondent has standing to challenge DAPA.

1.b. Whether DAPA is unreviewable under the Administrative Procedure Act.

2. Whether DAPA is contrary to law or violates the Constitution.

3. Whether DAPA was subject to the Administrative Procedure Act's notice-and-comment requirement.

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BRIEF IN OPPOSITION

INTRODUCTION

The Executive Branch unilaterally created a program—known as DAPA—that will grant "lawful presence" and eligibility for work permits to over four million aliens who are present in this country unlawfully. "Lawful presence," an immigration classification established by Congress, allows aliens to receive numerous benefits—such as Medicare, Social Security, the Earned Income Tax Credit, and unemployment insurance. And Congress has created a detailed, complex statutory scheme for determining when an alien may lawfully enter and be present in this country.

The Executive claims the power to ignore these statutes and unilaterally deem lawful the presence of any unauthorized alien it chooses not to remove. Moreover, the Executive asserts that it may do so for mil-

lions of aliens without even using conventional notice-and-comment procedures. But the Executive does not dispute that DAPA would be one of the largest changes in immigration policy in our Nation's history. The President himself described DAPA as "an action to change the law." Pet. App. 384a; R.69.[1] There is no statutory or constitutional authority for such a change; and at a minimum, it had to be promulgated with notice-and-comment procedure.

The Executive does have enforcement discretion to forbear from removing aliens on an individual basis. The preliminary injunction does not interfere with that discretion. It does not require the Executive to remove any alien, or affect the Executive's separate memorandum, Pet. App. 420a-429a, establishing three categories for removal prioritization.

But law-enforcement discretion does not confer the distinct power to deem unlawful conduct as lawful, or to change an alien's statutory immigration classification. The Executive admits, as it must, that DAPA does not merely abandon (or "defer") removal proceedings. It expressly grants aliens work-permit eligibility and lawful presence in this country. "Lawful presence" is not an empty label. It is a designation used throughout the United States Code, and it confers eligibility for numerous benefits—including Social Security, Medicare, the Earned Income Tax Credit, and unemployment insurance.

The Fifth Circuit correctly rejected petitioners' sweeping and unprecedented assertion of Executive au-

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[1] The Fifth Circuit electronic record on appeal is cited as R.*p*.

thority. This Court can deny certiorari on that basis alone. Moreover, petitioners do not even attempt to assert a circuit split, and the case remains in a preliminary, interlocutory posture. Petitioners' asserted justification for review—that DAPA is an important new federal program—is at odds with their own submission that DAPA is merely a general policy statement advising the public of the Secretary of Homeland Security's tentative intentions. Pet. 29. In reality, of course, DAPA *is* a crucial change in the Nation's immigration law and policy—and that is precisely why it could be created only by Congress, rather than unilaterally imposed by the Executive. If the Court grants review, it should affirm the injunction and uphold the separation of powers, as it did in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

STATEMENT

A. Statutory Background

1. **Lawful presence.** Through the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, Congress has delineated detailed criteria for an alien to obtain legal authorization to be in the country. *See, e.g., id.* §§ 1101(a)(20), 1255 (lawful permanent resident (LPR) or "immigrant" status); *id.* § 1101(a)(15)(A)-(V) (visas or "nonimmigrant" status); *id.* §§ 1101(a)(42), 1158, 1231(b)(3) (refugee status); *id.* § 1182(d)(5)(A) (humanitarian parole); *id.* § 1254a (temporary protected status).[2]

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[2] Congress has also directed that each individual without authorization to be in this country "shall" be "inspected" by

Congress has strictly limited the ability of aliens to acquire lawful presence on the basis of family reunification. Congress has created *no* path for alien parents to obtain lawful presence based on their child's LPR status. And if their child is a citizen, alien parents can obtain lawful presence for that reason *only* if they fulfill a number of demanding requirements, including voluntarily leaving the country and waiting for any reentry bar to expire. *Id.* §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255.

Congress has occasionally granted the Executive authority to confer deferred action, with attendant legal consequences, on specific categories of aliens. In each case, the covered aliens either had a preexisting lawful status or would imminently obtain lawful status. *See* Pet. App. 189a, 190a & n.78; *see also* Pet. App. 81a-82a. Congress has expressly delegated to the Executive the authority to grant class-wide deferred action in only four narrow circumstances. *See* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (certain petitioners under the Violence Against Women Act); Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (certain family members of LPRs killed on September 11, 2001); Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-95 (certain family members of U.S. citizens killed in combat); 8 U.S.C. § 1227(d)(1)-(2) (certain T- and U-visa applicants); *see*

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immigration officers; if the officer determines that the individual is not clearly entitled to be admitted, the individual "shall be detained" for removal proceedings. 8 U.S.C. § 1225(a)(1), (a)(3), (b)(2)(A). And Congress has created specific removal exceptions. *E.g.*, *id.* §§ 1182, 1227(a)(1), 1229b.

also R.510-11 (Office of Legal Counsel memorandum (OLC Memo) identifying only these four examples); *cf.* Pet. 7, 8, 25, 26.

2. **Work authorizations.** Congress also enacted detailed statutes addressing when aliens are authorized to work in the country. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, is "a comprehensive scheme" that "forcefully made combating the employment of [unauthorized] aliens central to the policy of immigration law." *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (internal quotation and alteration marks omitted).

Among other things, Congress established penalties for employers who hire "unauthorized aliens." 8 U.S.C. § 1324a(a), (f). Employers cannot employ aliens who are neither LPRs nor "authorized to be so employed by this chapter or by the Attorney General [now, the Secretary of Homeland Security]." *Id.* § 1324a(h)(3) ("Definition of unauthorized alien"). This definitional subsection, which concerns employer liability, does not address the Executive's authority to *issue* work-authorization permits.

Indeed, Congress has separately demarcated the Executive's delegated authority to issue work permits. *E.g.*, *id.* § 1101(i)(2) (human-trafficking victims); *id.* § 1158(c)(1)(B), (d)(2) (asylum applicants); *id.* § 1184(c)(2)(E), (e)(6), (p)(3), (p)(6), (q)(1)(A) (spouses of L- and E-visa holders; certain crime victims; spouses and certain children of LPRs); *id.* § 1254a(a)(1) (temporary-protected-status holders). Congress also granted work-permit eligibility to a few narrow classes of deferred-action recipients. *E.g.*, 8 U.S.C.

§ 1154(a)(1)(D)(i)(II), (IV); Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. at 1694-95. Additionally, certain nonimmigrant visas automatically provide work authorization. *E.g.*, *id.* § 1101(a)(15)(E), (H), (I), (L) (commercial work); *id.* § 1101(a)(15)(A), (G) (foreign-government or international-organization work); *id.* § 1101(a)(15)(P) (athlete or entertainer work).

B. Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, the Executive created a program called Deferred Action for Childhood Arrivals, or DACA. R.123-25 (DACA memo). DACA grants a two-year "deferred action" term to unauthorized aliens who entered this country before June 15, 2007, were under age 16 at the time of entry, and were under age 31 on June 15, 2012, among other criteria. R.123. The Executive described DACA as an "exercise of prosecutorial discretion," "on an individual basis." R.124. As the record reveals, however, Executive officials reflexively approve applications that meet DACA's eligibility criteria. Pet. App. 386a-389a; R.1989, 2224, 4148, 4193.

DACA recipients are also deemed eligible for work permits. R.125. And although the DACA memo itself said nothing about lawful presence, the Executive has deemed DACA recipients lawfully present. R.4158.

After DACA's announcement, the President repeatedly emphasized that DACA marked the outer limit of his administrative powers: "But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally." R.2142; *see* R.65-66. Accordingly, the President

called upon Congress to change the immigration laws to implement his preferences. R.68. Congress did not oblige.

C. DAPA—The Challenged Directive

On November 20, 2014, the Secretary of Homeland Security issued the immigration directive challenged here—the DAPA Directive. Pet. App. 411a-419a; *see* R.4149. This directive does four significant things:

First, it directs the relevant Department of Homeland Security (DHS) division, USCIS, to expand DACA by (1) eliminating the age cap, (2) increasing the term from two to three years, and (3) adjusting the date-of-entry requirement to January 1, 2010. Pet. App. 415a-416a.

Second, it "direct[s] USCIS to establish a process, similar to DACA," to grant three-year terms of deferred action to aliens who (1) have a child who is a citizen or LPR, (2) lack authorization to be present in this country, (3) have been present since January 1, 2010, (4) are not one of three enforcement priorities, and (5) "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." Pet. App. 416a-418a. This program is known as Deferred Action for Parents of Americans and Lawful Permanent Residents. Pet. App. 244a, 383a; R.4791. For brevity, this brief uses "DAPA" for the Directive creating this program and expanding DACA.

Third, the Directive states that the "deferred action" awarded grants *lawful presence* to aliens who would otherwise be unlawfully present: "Deferred action . . . means that, for a specified period of time, an in-

dividual is permitted to be *lawfully present* in the United States." Pet. App. 413a (emphasis added).

Fourth, the Directive states that DAPA recipients are eligible for work authorizations. Pet. App. 417a-418a.

DAPA's grant of lawful presence triggers numerous other benefits, including:

1. *Driver's licenses.* *See* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 202(c)(2)(B)(viii), 119 Stat. 302, 313 ("deferred action status" basis for issuing driver's licenses); *see, e.g.*, Tex. Transp. Code § 521.142.
2. *Social Security.* 42 U.S.C. § 405(c)(2)(B)(i)(I) (Social Security number eligibility for aliens whose "status is so changed as to make it lawful for them to engage in . . . employment"); 8 U.S.C. § 1611(a), (b)(2) (benefits available to those "lawfully present"); 20 C.F.R. §§ 422.104(a), 422.107(a), (e); 8 C.F.R. § 1.3(a)(4)(vi).
3. *Earned Income Tax Credit.* 26 U.S.C. § 32(c)(1)(A), (c)(1)(E), (m) (eligibility based on valid Social Security number issued to alien whose status permits employment).
4. *Medicare.* 8 U.S.C. § 1611(b)(2)-(3) (certain benefits available to those "lawfully present"); 42 U.S.C. § 1395c (Medicare eligibility concurrent with Social Security eligibility).

5. *Unemployment insurance.* 26 U.S.C. § 3304(a)(14)(A) (eligibility for aliens who are "lawfully present"); *see, e.g.*, Ark. Code Ann. § 11-10-511; Tex. Lab. Code § 207.043(a)(3).

6. *Access to international travel*, via "advance parole." R.587-88; *cf.* 8 U.S.C. § 1182(d)(5)(A).

Shortly after DAPA issued, the President candidly admitted, "I just took an action to change the law." Pet. App. 384a.

D. Procedural History

Plaintiffs, respondents here, represent a majority of the States in the Union. Their lawsuit alleges that DAPA violates the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 706, and the Constitution, *see* U.S. Const. art. II, § 3, cl. 5. R.241-44. Respondents do not challenge the separate DHS memorandum that prioritizes categories of aliens for removal. *See* Pet. App. 332a-333a, 420a-429a.

Respondents moved for a preliminary injunction, R.137-81, and submitted over 1,000 pages of evidence, R.1247-2307. After a hearing, R.5120-257, the district court issued a 123-page opinion preliminarily enjoining DAPA, Pet. App. 244a-406a.

Petitioners appealed and moved in district court for a stay pending appeal. R.4508-30. The motion was denied. *Texas v. United States*, 2015 WL 1540022, at *8 (S.D. Tex. Apr. 7, 2015).

Petitioners moved for a stay in the Fifth Circuit. The Fifth Circuit denied the motion in a 42-page majority slip opinion, after hearing over two hours of oral ar-

gument. Pet. App. 156a-210a. Judge Higginson dissented. Pet. App. 211a-243a.

Petitioners did not file a stay application in this Court.

After regular briefing, two rounds of supplemental briefing, and two more hours of oral argument, the Fifth Circuit affirmed the district court's preliminary injunction of DAPA. Pet. App. 1a-90a. The court held that respondents had standing, Pet. App. 20a-36a, DAPA is reviewable, Pet. App. 36a-53a, DAPA required notice-and-comment, Pet. App. 53a-69a, and DAPA is substantively unlawful, Pet. App. 69a-86a. The court also agreed that respondents satisfied the equitable requirements for a preliminary injunction and that the nationwide scope of the injunction was proper. Pet. App. 86a-90a.

Judge King dissented, concluding that the challenge was not justiciable and that DAPA was lawful. Pet. App. 91a-155a.

ARGUMENT

The Fifth Circuit's decision is correct. The preliminary injunction of DAPA was necessary to uphold the separation of powers and ensure the proper functioning of the administrative state.

First, respondents have standing on multiple independent grounds. DAPA will directly impose substantial costs associated with issuing additional driver's licenses; it will also require additional healthcare, law-enforcement, and education expenditures. These injuries would easily establish standing for any ordinary litigant. In addition, States are due "special solicitude"

in the standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Second, DAPA is reviewable agency action. It created the authority, and established the criteria, for granting lawful presence and eligibility for a variety of benefits to millions of unauthorized aliens. Third, DAPA—one of the largest changes in immigration policy in our Nation's history—is a substantive rule that required APA notice-and-comment. Moreover, the Executive lacks substantive authority to create DAPA.

Other considerations also warrant a denial of certiorari. Petitioners have not even attempted to identify any conflict of authority, and the case is in an interlocutory posture. Ultimately, petitioners' sole argument for review is that DAPA is a vastly important change in the Nation's approach to immigration. It is true that fundamental questions of immigration policy are "properly resolved through the political process." Pet. 12. But that political process must include the People's elected representatives in Congress. Executive agencies are not entitled to rewrite immigration laws. Nor are they entitled to short-circuit public participation by dispensing with notice-and-comment rulemaking. Petitioners' solitary argument for certiorari therefore only reinforces that DAPA is reviewable and at a minimum required APA notice-and-comment.

I. The Court of Appeals Correctly Upheld the Preliminary Injunction.

The Fifth Circuit correctly held that the district court did not abuse its discretion in applying the four-factor preliminary-injunction test. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008). Petitioners' questions presented implicate only the first of those factors (likelihood of success on the merits). Petitioners have thereby forfeited any arguments about the remaining three factors (irreparable harm, balance of equities, and public interest) and the injunction's nationwide scope, Sup. Ct. R. 14.1(a), which the Fifth Circuit correctly resolved in respondents' favor, Pet. App. 86a-90a.

A. Respondents Have Standing.

Respondents have standing because they possess a "personal stake" in the outcome of this lawsuit. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation omitted). "[O]ne party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

The court of appeals correctly concluded that respondents' "standing is plain" based on driver's-license costs imposed by DAPA. Pet. App. 11a. The court did not reach respondents' alternative standing grounds, Pet. App. 11a, which are independent bases to affirm, *see J.E. Riley Inv. Co. v. Comm'r*, 311 U.S. 55, 59 (1940).

1. **Driver's-license costs.** The courts below found that DAPA would impose substantial costs on the plain-

tiff States' driver's-license programs. Pet. App. 20a-21a, 288a.

Texas is one example. Under Texas law, DAPA recipients would be eligible for driver's licenses. Tex. Transp. Code § 521.142(a); *id.* §§ 521.181, 521.1425(d). Petitioners do not challenge the factual findings that (1) at least 500,000 aliens in Texas would be eligible for DAPA; (2) many of them would seek driver's licenses; and (3) Texas would lose over $100 per license. Pet. App. 20a-21a, 31a-32a, 271a-273a; *see* R.2106. Even if only a small fraction of DAPA recipients apply for driver's licenses, Texas would incur millions of dollars in costs. Pet. App. 21a; *cf. Arpaio v. Obama*, 797 F.3d 11, 23 (D.C. Cir. 2015), *cert. pet. pending*, No. 15-643 (filed Nov. 12, 2015) (contrasting this basis for standing with the standing allegations made in that case).

Other States will experience similar costs. *See, e.g.*, R.2040, 2047, 2247.[3] Moreover, a portion of these costs is directly attributable to the federal REAL ID Act of 2005, 119 Stat. at 313. *See* Pet. App. 21a n.58.

Petitioners respond that Texas is free "to alter or eliminate its subsidy"—in other words, Texas can pass on the costs imposed by DAPA. Pet. 16. But as the Fifth Circuit explained, this logic "would deprive states of judicial recourse for many bona fide harms." Pet. App.

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[3] Petitioners have abandoned, and the questions presented do not include, any argument that States lack standing because these costs can be "offset" by the speculative financial benefits that may flow from DAPA. *See* Pet. App. 313a; Wash. State et al. Amicus Br. 11. The Fifth Circuit correctly rejected this theory. Pet. App. 21a-23a.

24a-25a. States theoretically could pass on *any* financial injury through taxes or fees. Pet. App. 24a-25a. Yet this Court has routinely held that States have standing based on financial losses. *E.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 447-48 (1992); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160-61 (1981). Similarly, States frequently establish injury based on federal preemption of their laws, Pet. App. 25a & n.64, even though they are free to change those laws.

In short, a defendant cannot defeat standing by asserting that a plaintiff should avoid the harm through a change of policy or behavior. Otherwise, any number of familiar standing cases would be wrongly decided. *See, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986). Here, Texas could avoid the driver's-license-cost injury only by changing its policy and making driver's licenses less affordable. That is itself an injury, because Texas has a sovereign interest in enforcing its legal code. Pet. App. 24a; *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).[4]

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[4] In the courts below, petitioners argued that Texas could simply deny driver's licenses to deferred-action recipients. Pet. App. 24a; *see* Wash. State et al. Amicus Br. 9. Yet the Executive took the opposite position, R.1309-18, in *Arizona DREAM Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), which held that plaintiff Arizona was required to grant driver's licenses to all deferred-action recipients. In any event, being forced to change the State's standards as to who may receive driver's licenses would itself be an injury, as explained above.

The doctrine of self-inflicted injury is far narrower than petitioners suggest. It is a causation principle that applies only where a plaintiff has "manufacture[d]" standing, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013), and the injury is therefore not attributable to the defendant, 13A Fed. Prac. & Proc. Juris. § 3531.5. For example, respondents' injuries would be self-inflicted if they had amended their driver's-license laws in reaction to DAPA, simply to incur costs and manufacture standing. *Cf. Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011). But respondents have done nothing of the sort. *Cf.* Pet. 18. Their laws predate DAPA (and DACA). *See* Pet. App. 27a.

Wyoming v. Oklahoma, 502 U.S. 437 (1992), confirms that the self-inflicted-injury doctrine does not apply here. *See* Pet. App. 27a. There, Wyoming had standing to challenge an Oklahoma policy that decreased coal sales in Wyoming and resulted in "direct injury in the form of a loss of specific tax revenues"—despite Wyoming's power to increase the tax rate or tax something else. *Wyoming*, 502 U.S. at 447-48. Similarly, Texas has standing despite its power to increase fees or impose fees elsewhere.[5]

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam), predates *Wyoming* and is not to the contrary. *Cf.* Pet. 16-17. Each plaintiff State's injury in

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[5] *Wyoming* also refutes petitioners' contention that there is no standing because DAPA "does not regulate States or require States to do . . . anything." Pet. 15; *Wyoming*, 502 U.S. at 440 (law regulated only Oklahoma power plants).

Pennsylvania resulted from its own policy of giving its taxpayers credit for commuter taxes paid in neighboring States; the Court held that the plaintiff States lacked standing to challenge the constitutionality of other States' commuter taxes. *Pennsylvania* stands at most for the proposition that taxation by one State is not inconsistent with taxation by another. *See* 7 Fed. Prac. & Proc. Juris. § 4051. Furthermore, *Pennsylvania* turned on the constitutional provisions at issue (the Privileges and Immunities and Equal Protection Clauses), which "protect people, not States." 426 U.S. at 665.

Petitioners argue that *Wyoming* is distinguishable because it does not feature one sovereign incorporating the law of another. Pet. 16-17. This misses the point. The relevant distinction is that, unlike the plaintiff States in *Pennsylvania*, Texas and Wyoming "cannot both change their laws to avoid injury from amendments to another sovereign's laws *and* achieve their policy goals." Pet. App. 28a n.65. In addition, Texas cannot be faulted for incorporating federal immigration classifications into its driver's-license determinations because, as petitioners have previously conceded, it is forbidden from creating its own. Pet. App. 170a n.34; *cf.* Pet. 18.[6]

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[6] Petitioners also rely on purported "structural bars" which, in reality, have no effect on this case. Pet. 14-15. Respondents are not contesting any nonprosecution decisions and do not base their standing on "collateral benefits" of nonprosecution. *Cf.* Pet. 21. Instead, respondents' standing is based on direct harms to the States and their residents. *See* Pet. App. 19a (noting that petitioners' cases "concerned only nonprosecution" rather than "both nonprosecution and the conferral of

2. **Healthcare, education, and law-enforcement costs.** The States also have standing because DAPA will cause them to incur healthcare, law-enforcement, and education costs. Texas spends hundreds of millions of dollars on uncompensated healthcare for unauthorized aliens. Pet. App. 302a; R.1248-92; *see also* Pet. App. 298a (law-enforcement costs). Texas also spends over $9,000 annually to educate each unauthorized alien who attends public school—as required by *Plyler v. Doe*, 457 U.S. 202 (1982). In a single year, Texas spent almost $60 million on education costs stemming from unlawful immigration. Pet. App. 301a; *see* R.1983-87.

The district court found that DAPA will increase the number of unauthorized aliens imposing these costs. Pet. App. 311a-312a. Quite apart from any future increase in immigration, *see* Pet. App. 314a & n.43; R.1998-99, there will be aliens who would have emigrated but for DAPA's benefits, and aliens who would have been removed but for DAPA, R.2249.

3. ***Parens patriae***. States have *parens patriae* standing to vindicate their "quasi-sovereign" interest in protecting their citizens' "economic well-being." *Alfred L. Snapp*, 458 U.S. at 601, 605. In this capacity, a State can sue the federal government to *enforce* federal law, as respondents do here, but cannot sue the federal government to "protect her citizens *from* the operation of federal statutes." *Massachusetts*, 549 U.S. at 520 n.17 (emphasis added).

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benefits"); *cf.* Pet. 14 (discussing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), and *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984)).

In the Fifth Circuit, petitioners admitted that lawful residents would have "competitor standing" to challenge legalization of work by unauthorized aliens. Oral Arg. at 0:06:40-0:07:10, 0:07:55-0:08:19, No. 15-40238 (5th Cir. Apr. 17, 2015). As *parens patriae*, the States have the same standing. In addition, respondents seek to protect their citizens from economic discrimination in favor of DAPA recipients, caused by the Affordable Care Act. R.2285; *see* 8 U.S.C. § 1611(a); 26 U.S.C. § 4980H(b).

4. **Special solicitude and institutional injury.** As in *Massachusetts*, the plaintiff States here are suing to protect sovereign interests. 549 U.S. at 519-20; Pet. App. 15a-18a. Because States ceded certain sovereign prerogatives upon entering the Union, they "cannot establish their own classifications of aliens." Pet. App. 17a. Accordingly, the plaintiff States "now rely on the federal government to protect their interests." Pet. App. 18a. And, like in *Massachusetts*, the States have a procedural right—here, furnished by the APA. 549 U.S. at 517; *see* Pet. App. 15a-16a. The States are thus "'entitled to special solicitude in [this Court's] standing analysis.'" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 n.10 (2015) (quoting *Massachusetts*, 549 U.S. at 520); *see* Pet. App. 12a-20a.

Petitioners suggest that States have no sovereign interests in who is lawfully within their borders. Pet. 16, 19. But States have an "easily identified" interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction." *Alfred L. Snapp*, 458 U.S. at 601. And *Arizona* recognized "the

importance of immigration policy to the States." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). Additionally, as noted above, DAPA intrudes on the States' sovereign interests in enforcing their legal code and protecting their citizens' economic well-being.

Moreover, as in *Arizona State Legislature*, respondents are "institutional plaintiff[s] asserting an institutional injury." 135 S. Ct. at 2664; *see* Pet. App. 315a-331a. Petitioners therefore get it precisely backward when they suggest that the States are *less* likely to establish standing than regular litigants. Pet. 15.

Petitioners resort to a parade of horribles, suggesting that recognizing respondents' standing would create a flood of litigation. Pet. 17-18; *see* Intervenors' Br. 20-21. The Fifth Circuit correctly rejected these arguments. First, "standing requirements would preclude much of the litigation the government describes"; for example, the injury and causation requirements would likely be difficult to meet in cases involving individual aliens. Pet. App. 34a-35a. Second, few litigants will be entitled to "special solicitude." Pet. App. 35a. Third, the APA imposes a number of relevant limitations. Pet. App. 34a. Fourth, "it is pure speculation that a state would sue about matters such as an IRS revenue ruling." Pet. App. 35a-36a. Finally, *Massachusetts* "entailed similar risks, but the Court still held that Massachusetts had standing." Pet. App. 33a.

B. DAPA Is Reviewable.

DAPA is reviewable under the APA, consistent with "Congress's 'evident intent' . . . 'to make agency action presumptively reviewable.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (citation omitted).

1. DAPA Is Reviewable Agency Action.

a. DAPA is not unreviewable as an exercise of enforcement discretion. *Cf.* Pet. 13, 18, 20-21, 23, 30. The type of enforcement decisionmaking that traditionally has been "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is "very narrow," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (citation omitted).

Unlike a decision to forbear from removing particular aliens, Pet. 20, DAPA would deem lawful the presence of millions of unauthorized aliens. This cannot be "an exercise of [the Executive's] enforcement discretion," because "it purports to *alter* [INA] requirements" and pronounce "that otherwise-prohibited conduct will not violate the Act." *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) (*UARG*).

The district court's injunction neither prohibits nor requires any removal proceedings, and it does not prevent the Executive from deprioritizing removal for identified aliens. Pet. App. 331a-335a, 405a.[7] The sepa-

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[7] Petitioners admitted below that they could still distribute "documentation designating certain [unauthorized] immigrants as low-priority law enforcement targets without additionally awarding legal status and other benefits." *Texas*, 2015 WL 1540022, at *7. Accordingly, petitioners are wrong

rate DHS memo prioritizing three categories of aliens for removal is neither enjoined nor challenged. Pet. App. 420a-429a.

No case holds that changing immigration classification or benefits eligibility is unreviewable. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*), confirms that the Executive has distorted "deferred action" beyond this Court's conception of it. *AADC* explained that "deferred action" entailed simply the "discretion to abandon" removal proceedings. *Id.* at 483-84. Abandonment of a removal proceeding, of course, is "an agency's decision not to take enforcement action," which is "presumptively unreviewable" under *Heckler*. 470 U.S. at 832. But the affirmative acts of granting lawful presence and work-authorization eligibility are reviewable. *See id.* at 831.

Petitioners argue that "lawful presence" means only that "DHS has decided to countenance that person's continued presence in the United States." Pet. 21 (claiming that "lawful presence" is "simply the label for the consequence of memorializing a decision to forbear from enforcement action for a designated time"). That understanding is not shared by Congress, which in 1996 amended statutes to make lawful presence a condition of certain benefits. *See infra* pp. 35-36. As the Fifth Circuit explained, DAPA "transform[s] presence deemed unlawful by Congress into lawful presence and

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that without DAPA they would "have to do the underlying legwork every time." Pet. 34.

confer[s] eligibility for otherwise unavailable benefits based on that change." Pet. App. 46a.[8]

Petitioners are wrong that DAPA's consequences should be attributed to previous statutes and regulations. Pet. 21. It is DAPA—and not prior statutes or regulations—that grants lawful presence to millions of unauthorized aliens and makes them eligible for work authorization. *See, e.g.*, Pet. App. 368a (district court recognizing that DAPA "awards some form of affirmative status").[9]

To be sure, DAPA professes not to grant a "legal status." Pet. 10. But it then explicitly grants lawful presence—a status that DAPA recipients could not otherwise receive.[10] That status has several "consequences," including eligibility for Social Security, Medicare, the Earned Income Tax Credit, and unemployment benefits. *See supra* pp. 8-9. An action that eliminates a categorical eligibility bar "provides a focus for judicial

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[8] Petitioners argue that this change is "revocable," Pet. 20, but revocability "is not the touchstone" for whether agency action is reviewable. Pet. App. 46a. Conferring lawful presence is an affirmative action, and lawful presence is valuable while it is possessed. Pet. App. 389a.

[9] This feature distinguishes DAPA from pretrial diversion, which neither grants accused criminals an affirmative status, nor deems their conduct lawful. *Cf.* Pet. 22.

[10] Indeed, "deferred action," as the Executive now uses the term, is itself a legal status. *See* R.1317 (United States Brief in *Arizona DREAM Act Coalition*) (stating that "'approved deferred action status' is 'lawful status' that affords a period of 'authorized stay'").

review." *Heckler*, 470 U.S. at 832.[11] Petitioners argued below that DAPA did not *also provide an independent path to LPR status or citizenship*. R.407. This may be true, but it is irrelevant.

b. DAPA is not otherwise committed to agency discretion by law. Pet. App. 42a-50a. Lacking any express statutory language, petitioners are forced to argue that DAPA is implicitly committed to Executive discretion. Pet. 22-23.

But Congress did not give the Executive the unreviewable power to grant lawful presence and establish eligibility for benefits. *Cf.* Pet. 22. "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," and there is "a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted). Petitioners identify no "clear and convincing evidence of legislative intention to preclude review." *Japan Whaling*, 478 U.S. at 230 n.4. And the Executive's "'action at least can be reviewed to determine whether the agency exceeded its statutory powers'" against the intricate backdrop of the INA. Pet. App. 49a (footnote omitted) (quoting *Heckler*, 470 U.S. at 832).

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[11] *Heckler*'s unreviewability presumption, even if applicable, would be rebutted. Agency policy that "is so extreme as to amount to an abdication of its statutory responsibilities" is reviewable. 470 U.S. at 833 n.4. The Executive has expressly abdicated its responsibility to enforce Congress's criteria for establishing lawful presence and work-permit eligibility. *See supra* pp. 3-6.

No statute delegates to the Executive the discretion to grant lawful presence to any unauthorized alien it chooses not to remove. Pet. App. 361a; *see* Pet. App. 189a-192a. Contrary to petitioners' view, Pet. 2-3, the Executive's authority to enforce immigration laws (8 U.S.C. § 1103(a)(3)) and set enforcement priorities (6 U.S.C. § 202) does not create such unbridled discretion. Congress has explicitly given the Executive discretionary authority in some instances—for example, by using the statutory phrase "at the Secretary's sole and unreviewable discretion," 8 U.S.C. § 1182(a)(10)(C)(ii)(III). And Congress has created "'discretionary relief'" allowing narrow categories of aliens in removal proceedings "'to remain in the country.'" Pet. App. 71a & n.163 (quoting *Arizona*, 132 S. Ct. at 2499 (certain aliens seeking asylum, cancellation of removal, voluntary departure, or T or U visas)). But it has not done so with respect to determining lawful presence.

The same is true of work authorization. Congress has expressly made various classes of aliens eligible or ineligible for work authorization; in particular, it has specified that certain narrow categories of individuals with deferred action can obtain work permits. *See supra* pp. 5-6. Petitioners claim unreviewable authority to issue work permits. But this cannot be squared with the INA. *See infra* pp. 33-35; *cf.* Pet. 23 (arguing that this power flows from the Executive's "discretion over removals"). Nor could it stem from regulations promulgated before Congress enacted comprehensive statutory reform of alien employment in 1986. *See* Pet. 23 (citing 44 Fed. Reg. 43,480 (July 25, 1979)). And it does not flow from 8 U.S.C. § 1324a(h)(3), which is a definitional

provision that shapes employer liability and does not grant Executive authority, much less mention deferred action or lawful presence.

Petitioners also assert that the Executive has unreviewable discretion to grant Medicare and Social Security eligibility to any unauthorized alien it chooses not to remove. Pet. 22; *see* Pet. 6-7. But the statutes petitioners rely on, 8 U.S.C. § 1611(b)(2) and (3), say nothing about unreviewable executive discretion. In fact, 8 U.S.C. § 1611 was enacted by Congress to *curtail* the benefits that had been available to unauthorized aliens. *See infra* pp. 35-36. And Congress knows how to delegate unreviewable discretion: it did just that in a separate, nearby provision regarding community services. *See* 8 U.S.C. § 1611(b)(1)(D) (referring to "the Attorney General's sole and unreviewable discretion").

c. The INA does not bar judicial review of respondents' claims. Pet. 22-23; *see* 5 U.S.C. § 701(a)(1). Petitioners note that the INA's cause of action for challenging individual orders of removal is limited to aliens. Pet. 23 (citing 8 U.S.C. § 1252). But this suit does not concern individual removal orders. And respondents rely on the APA and the Constitution for their causes of action. *See* 5 U.S.C. § 702; *United States v. Lee*, 106 U.S. 196, 220-21 (1882).

Petitioners next point to two inapplicable reviewability bars. Pet. 22-23. Respondents bring no claim "by or on behalf of any alien" to challenge a determination concerning removal proceedings. 8 U.S.C. § 1252(g). And 8 U.S.C. § 1252(a)(2)(B)(ii) concerns decisions "specified . . . to be in the discretion of the [Secretary],"

whereas none of the powers invoked by petitioners are so specified.[12]

For similar reasons, there is no "broader statutory framework" of unreviewability. Pet. 23 n.4. No statute bars judicial review of Executive immigration actions generally, and no INA judicial-review bar applies. *See* Pet. App. 39a-41a. To the contrary, the INA's narrow, reticulated exclusions *foreclose* any broader jurisdiction-stripping inference, which would render the specific provisions superfluous. *See AADC*, 525 U.S. at 486-87 (listing sections insulating Executive discretion from judicial review).

2. Respondents Satisfy the APA's Zone-of-Interests Test.

Respondents are also within the INA's and APA's "zone of interests." Pet. 18-20. This test is not "especially demanding." *Patchak*, 132 S. Ct. at 2210. No judge below found that respondents failed to satisfy it.

This Court has recognized "the importance of immigration policy to the States." *Arizona*, 132 S. Ct. at 2500. And States have an interest in protecting their citizens by reserving jobs for those lawfully entitled to work—a key immigration-law goal. *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 (1991). Petitioners incorrectly conflate the concrete-injury standing analysis and the zone-of-interests test. Pet. 19. Respondents' interests need only be "arguably within the

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[12] Neither 8 U.S.C. § 1182(a)(9)(B)(ii) nor § 1324a(h)(3) mentions "discretion." Many other INA provisions do. *See* Pet. App. 40a & nn.88-89.

zone of interests to be protected or regulated by the statute." *Patchak*, 132 S. Ct. at 2210. The Fifth Circuit relied on *Arizona* and recognized that the "interests the states seek to protect fall within the zone of interests of the INA." Pet. App. 37a.[13]

Respondents are also squarely within the zone of interests of the APA's notice-and-comment provision, which allows interested persons to comment on administrative decisionmaking. *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). States are entitled to deny benefits to unauthorized aliens, 8 U.S.C. § 1621(a),[14] so they are keenly interested in whether millions of unauthorized aliens are rendered lawfully present. Pet. App. 37a.

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[13] The Fifth Circuit did not rely exclusively on 8 U.S.C. § 1621, as petitioners imply. Pet. 19. Regardless, that statute permits States to withhold benefits to unauthorized aliens, *id.* § 1621(a), and recognizes lawful presence as an immigration classification, *id.* § 1611.

[14] Contrary to petitioners' assertion, Pet. 19 n.2, Texas has extended unemployment benefits to lawfully present aliens, Tex. Lab. Code § 207.043(a)(3); *cf.* 8 U.S.C. § 1621(d) (States need to enact statutes after 1996 only to extend benefits to "an alien who is *not* lawfully present") (emphasis added). And petitioners have waived any challenge to the finding that respondent Wisconsin has paid $570,748 in unemployment benefits to deferred-action recipients. Pet. App. 302a. Furthermore, regardless of whether driver's licenses are § 1621 "public benefits," *compare* Pet. 19, *with* Pet. App. 180a n.48, Texas has a significant interest in DAPA because it will extend driver's-license eligibility to millions of aliens under Texas Transportation Code § 521.142.

C. DAPA Is Unlawful.

1. DAPA Required Notice and Comment.

The Fifth Circuit correctly concluded that DAPA is a substantive rule and thus required APA notice-and-comment.[15] Pet. App. 53a-64a; *see* 5 U.S.C. § 553(b)(3)(A). That procedure was not followed, so DAPA is unlawful.

For multiple independent reasons, DAPA is not a "general statement of policy" exempt from APA notice-and-comment. The Executive's own label is not controlling. *See, e.g.*, *CBS, Inc. v. United States*, 316 U.S. 407, 416 (1942); *cf.* Pet. 30. And circuit courts recognize that "notice and comment exemptions must be narrowly construed" to further Congress's goal of allowing parties to provide the agency robust perspectives. *See* Pet. App. 54a (citations omitted); *cf.* Pet. 13 (advocating for agency "flexibility").

First, DAPA would be one of the largest changes in immigration policy in our Nation's history, and a rule is substantive when it "affect[s] individual rights and obligations." *Chrysler*, 441 U.S. at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). It is therefore "easy" to find that DAPA is a substantive rule because it "changed the law." *NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011). No "statute, prior regulations, or case law" authorizes the Executive to grant lawful presence to millions of unauthorized aliens. *Id.* at 321. As the Fifth Circuit observed, DAPA is "easily distinguished"

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[15] Petitioners have never disputed that DAPA is a "rule" under the APA. 5 U.S.C. § 551(4).

from agency actions that lacked legal force; DAPA "has an effect on regulated entities" because it "remove[s] a categorical bar to [unauthorized] aliens who are receiving state and federal benefits." Pet. App. 59a n.137; *see Ruiz*, 415 U.S. at 235-36 (holding that notice-and-comment procedures were needed to change "eligibility requirements" for benefits to Native Americans).

Lincoln v. Vigil is inapposite. 508 U.S. 182 (1993). *Lincoln* held that an agency's unreviewable decision to "discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation" was not a substantive rule. *Id.* at 197. *Lincoln* expressly distinguished *Ruiz* on the basis that the agency in *Lincoln* did not "modify eligibility standards." *Id.* at 198.

Petitioners make two counterarguments, both unavailing. Pet. 31-32. First they claim that DAPA is exempt from notice and comment as "a matter relating to ... public ... benefits." 5 U.S.C. § 553(a)(2). As the Fifth Circuit explained, that exception is inapplicable for three reasons: (1) the key legal consequence of DAPA—lawful presence—is not a public benefit; (2) USCIS, which is in charge of processing the applications, is not an agency that administers benefit programs; and (3) this exception must be construed narrowly. Pet. App. 67a-68a, 205a-207a.

Petitioners also argue that DAPA recipients are entitled to work permits and Social Security as a result of previous regulations that themselves underwent notice-and-comment. But DAPA is necessary for millions of unauthorized aliens to get work permits and Social Security. And in any event, petitioners admit that another legal consequence of DAPA—the tolling of the unlaw-

ful-presence clock that would otherwise cause the imposition of a reentry bar, *see* 8 U.S.C. § 1182(a)(9)(B)(i)(I)-(II), (ii)—never went through notice-and-comment. Pet. 32 n.5; *see* Pet. 22.

Second, an agency action must be *tentative* to count as a general statement of policy. *See, e.g., Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). There is nothing tentative about DAPA. To the contrary, it "order[s] immediate implementation" of a variety of measures, Pet. App. 340a, and it is filled with mandatory language, Pet. App. 391a n.103 (collecting examples). Petitioners immediately began implementing it, granting Expanded-DACA permits to over 100,000 aliens in under three months, R.5282, and to over 2,000 aliens after the preliminary injunction was issued. *See* USCIS, *Fact Sheet: Important Information for Some DACA Recipients Who Received Three-Year* Work Authorization* (July 15, 2015), http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/3yr-EAD-fact-sheet.pdf.

Third, DAPA has a "restrictive effect on agency decisionmakers." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 601 (5th Cir. 1995); Pet. App. 385a-386a; *see Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) (substantive rule where discretion not exercised in "standard cases").[16] Here the district court

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[16] Petitioners argue that senior officials can instruct their subordinates without going through notice-and-comment. Pet. 30. That is true if the matter is one "of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). But petitioners do not even invoke this exemption, and the Fifth Cir-

found—after a careful review of the evidence—that DAPA, like DACA, would not be implemented with any genuine discretion in eligibility decisions. The Fifth Circuit concluded that this determination was not clearly erroneous. Pet. App. 64a. Petitioners do not even attempt to engage with any of the evidence, which shows (among other things) that no DACA requests were denied for discretionary reasons; that DAPA on its face purports to establish a process similar to DACA; and that DAPA applications would be processed in a way that denied discretion to USCIS officers. Pet. App. 56a-59a; *cf.* Pet. 31. In any event, it is uncontested that DAPA entirely eliminates discretion on a range of other issues, such as the length of the deferred-action period, the background check and biometrics requirements, and the application fee amount. Pet. App. 416a-418a.[17]

2. DAPA Is Contrary to Law and Violates the Constitution.

Respondents' two substantive claims provide alternative, independent bases to affirm. *See J.E. Riley*, 311 U.S. at 59.

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cuit persuasively explained that it cannot shield an action like DAPA, which carries massive consequences for outside parties. Pet. App. 64a-67a.

[17] Petitioners rely (at Pet. 30) on *Wayte v. United States*, 470 U.S. 598 (1985), which is irrelevant. *Wayte* considered only whether an exercise of genuine enforcement discretion had been implemented in a discriminatory way. *Id.* at 610-14. *Wayte* does not even mention the APA, let alone notice-and-comment.

a. The Executive's unilateral grant of lawful presence and work authorization under DAPA is "not in accordance with law." 5 U.S.C. § 706(2)(A); *see UARG*, 134 S. Ct. at 2446 (the Executive lacks "power to revise clear statutory terms"). The Constitution assigns most immigration responsibilities to the "national government," Pet. 15, 18, but it vests that power in Congress, U.S. Const. art. I, §§ 1, 8, cl. 4.

Given DAPA's breadth and magnitude, one would expect explicit congressional authorization for it. But there is none. *Cf.* Pet. 26. Petitioners do not dispute that Congress created intricate statutory provisions regarding when aliens can lawfully be present and work in the country. *See supra* pp. 3-6; *Arizona*, 132 S. Ct. at 2499 ("Federal governance of immigration and alien status is extensive and complex."). Neither historical practice nor the delegations at 8 U.S.C. § 1103(a)(1)-(3) and 6 U.S.C. § 202(5) modify those statutory limitations.[18] After all, whether millions of aliens are lawfully present and eligible for benefits is "a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *UARG*, 134 S. Ct. at 2444).

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[18] Nor did Congress expand the Executive's power through a 2015 appropriation (*cf.* Pet. 25), which dealt only with "necessary expenses for enforcement of immigration . . . laws, detention and removals." Pub. L. No. 114-4, tit. II, 129 Stat. 39, 42.

Petitioners are also incorrect that "[t]he Secretary has similarly longstanding authority to decide whether a class of aliens should be eligible to be lawfully employed." Pet. 26. The INA dictates which classes of aliens are eligible and ineligible for employment. *See supra* pp. 5-6. Absent from this scheme is any provision giving the Executive unlimited power to grant work authorizations to any alien. *See King*, 135 S. Ct. at 2489.

To assert this far-reaching power, the Executive relies on 8 U.S.C. § 1324a(h)(3), which defines the term "unauthorized alien" in that section to exclude aliens "authorized [to work] by the Attorney General." Pet. 27. But § 1324a regulates *employers*. Subsection (h)(3) is a definitional provision, freeing employers from punishment for relying on work permits. The subsection does not address, let alone vastly expand, the scope of Executive authority to *issue* those work permits.[19]

Petitioners' interpretation of § 1324a(h)(3) would make surplusage of the numerous INA provisions that empower the Executive to authorize work for targeted classes of aliens. *See supra* pp. 5-6. This complex statutory scheme belies petitioners' suggestion that the granting of work authorization is "closely bound up" with exercising discretion to forbear from removal. Pet. 13, 23. In fact, when Congress has wanted to permit de-

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[19] Section 1324a(h)(3) does refer to aliens "authorized to be so employed by [the INA] *or* by the [Secretary]." Pet. 27 (emphasis added by petitioners). This is because, under the INA, work authorization is automatic for some enumerated classes of aliens, but the Executive has certain discretion as to other classes specified by Congress. *See supra* pp. 5-6.

ferred-action recipients to obtain work authorization, it has said so. *See supra* pp. 5-6.

Unable to overcome these statutory obstacles, petitioners fall back on "regulations governing work authorization." Pet. 26-27 (citing 46 Fed. Reg. 25,079, 25,080 (May 5, 1981), *replaced by* 52 Fed. Reg. 16,216, 16,226-28 (May 1, 1987) (codified at 8 C.F.R. § 274a.12(a)-(c)). One of those regulations, 8 C.F.R. § 274a.12(c)(14), makes work authorization available to certain aliens granted deferred action. Petitioners insist that this regulation—which the Executive claimed would affect very few aliens and have only modest effects on the labor market, *see* 52 Fed. Reg. 46,092 (Dec. 4, 1987)—supports their current view that the Executive may authorize millions of aliens to work simply because it has chosen to "countenance[]" their presence. Pet. 27; *see* Pet. 5-6. The regulation is correctly read, however, as "pertaining only to those classes of aliens identified by Congress as eligible for deferred action and work authorization." Pet. App. 195a n.95.

In any event, if the regulation did mean what petitioners believe it does, it would conflict with the statutory framework that Congress has imposed. After the current regulation was enacted in 1987, Congress has repeatedly authorized the Executive to provide work permits only to specific, narrow categories of aliens, including certain deferred-action recipients. *See supra* pp. 5-6. Those provisions would be surplusage if the Executive already had the power to authorize *every* alien to work. As explained above, the only plausible reading of this statutory framework is that the Executive may provide work permits only to the classes of al-

iens specified by statute. The regulation therefore has valid applications and is not facially invalid. Pet. App. 195a n.95. But it has been abrogated to the extent it must be read—as petitioners advocate—to be incompatible with the current statutory framework. The Executive's claims of legislative *acquiescence* in its boundless reading of the regulation are precisely backward.[20]

DAPA also flouts the "intricate process for [unauthorized] aliens to derive a lawful immigration classification from their children's immigration status." Pet. App. 72a (citing 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255); *cf.* Pet. 28.[21] But petitioners' asserted theory of Executive power does not stop with family-unification policies. *Cf.* Pet. 28. Instead, petitioners claim the unbounded power to grant lawful presence to millions of unauthorized aliens under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-

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[20] Petitioners point to six irrelevant amendments of § 1324a, none of which affected the subsection they purport to interpret, § 1324a(h)(3). Those amendments in no way undermine the plain import of the provisions that *do* address work authorization. And petitioners' claims of acquiescence are especially implausible because, prior to 2012, the Executive had never undertaken a deferred-action program that was remotely similar to DAPA. *See* Pet. App. 81a-84a; *cf.* Pet. 27.

[21] In attempting to minimize the significance of DAPA, petitioners state without explanation that aliens who receive lawful presence through DAPA "are removable." Pet. 28. DAPA grants can be revoked, but so can a visa. *See* 8 U.S.C. § 1201(i). That does not mean a visa holder (or other lawfully present alien) is removable.

193, § 401, 110 Stat. 2105, 2261 (codified as amended at 8 U.S.C. § 1611(b)(2), (3)), and the INA. *See* Pet. 22. But under those statutes, Congress actually *foreclosed* legal status that arose solely from the Executive's decision not to enforce the immigration laws. PRWORA, for example, imposed limits on benefit eligibility for unauthorized aliens, and introduced 8 U.S.C. § 1611, which eliminated most benefits for unauthorized aliens who had previously received benefits without formal status (those who were "permanently residing in the United States under color of law"). *See, e.g.*, *Lewis v. Thompson*, 252 F.3d 567, 571, 577, 578 & n.20 (2d Cir. 2001).

Petitioners also defend DAPA as consistent with the Executive's "longstanding ... practice" of removal discretion. Pet. 24, 25-26. But that practice is neither challenged nor enjoined in this suit. Moreover, previous deferred-action programs are so unlike DAPA that they "shed[] no light on the [Executive]'s authority to implement DAPA." Pet. App. 84a; *see* Pet. App. 85a-86a (distinguishing DAPA's type of purported removal discretion as "manifestly contrary" to the INA). Most previous discretionary deferrals temporarily bridged lawful statuses, or they responded to crises on a circumstance- or country-specific basis. *See* Pet. App. 81a-82a, 189a, 190a & n.78. DAPA eclipses previous past uses of discretionary relief in scope, *see* Pet. App. 321a n.46, and in kind, *e.g.*, Pet. App. 83a (noting previous use of

voluntary departure, rather than deferred action, in a "Family Fairness" program that was "interstitial to a statutory legalization scheme").[22]

That the Executive possesses enforcement discretion and faces resource constraints, *see* Pet. 25-26, does not mean the Executive has inherent power to grant lawful presence and eligibility for work permits to over four million unauthorized aliens. *See* R.498 (OLC Memo) ("[T]he Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences."); *cf.* Pet. 5.

b. DAPA also violates the Take Care Clause, and the Constitution's separation of powers more generally. *See* R.153-64, 1179-210. Presidential action that lacks congressional support "must be scrutinized with caution." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). DAPA's grants of lawful presence and work-permit eligibility are "measures incompatible with the expressed or implied will of Congress," where the "[President's] power is at its lowest ebb." *Id.* at 637. Petitioners' argument that DAPA is necessary so that unauthorized aliens can "support themselves through lawful work," Pet. 27, is also directly contrary to Congress's will as expressed in the INA's reticulated work-authorization scheme.

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[22] Family Fairness granted voluntary departure to about 47,000 people, R.2060, not 1.5 million people, Pet. 7.

II. Certiorari Is Not Warranted at This Stage.

Petitioners have not alleged that the Fifth Circuit's decision is "in conflict with the decision of another United States court of appeals" or "a state court of last resort." Sup. Ct. R. 10. Petitioners suggest that no other court is likely to review DAPA. Pet. 34. But they have failed to identify a split of authority on any of the legal principles at issue in the case. And the case is in an interlocutory posture.

Moreover, while petitioners address the merits at length, they ignore the other three prongs of the preliminary-injunction analysis. Petitioners have thereby forfeited any challenge to the equitable bases for or nationwide scope of the injunction. And the injunction is not "unprecedented." Pet. 11, 13, 32. Courts routinely enjoin unlawful agency action. *See, e.g.*, *Coal. for Responsible Regulation, Inc. v. EPA*, 606 F. App'x 6, 7-8 (D.C. Cir. 2015) (per curiam) (vacating unlawful EPA regulations in accordance with *UARG*).

Petitioners rely almost exclusively on DAPA's "great and immediate significance." Pet. 35; *see* Pet. 33-34. This argument contradicts petitioners' own characterization of DAPA as a general statement of policy, which merely advises the public of the Secretary of Homeland Security's tentative intentions. Pet. 29. If that characterization were accurate, further review would be unwarranted: An interlocutory decision that creates no splits does not merit review simply because it temporarily halts the implementation of a tentative policy statement that has no legal significance.

In reality, of course, DAPA *is* a significant and immediate change in immigration law and policy. But this

only highlights the breadth of petitioners' theory of Executive power. According to petitioners, this crucial policy shift (1) does not affect respondents enough to create a case or controversy, (2) cannot be reviewed by any court, (3) falls within the Executive's unbridled discretion, and (4) did not even require notice-and-comment procedure to implement. That is a remarkable claim.

This particular assertion of unilateral Executive power occurred in the immigration context. But if petitioners' arguments are accepted, there is nothing stopping this Executive or future Executives from invoking resource constraints to declare conduct lawful in other areas—such as environmental, tax, criminal, campaign-finance, and civil-rights laws. Pet. App. 328a.

Petitioners urge a view of Executive power that is manifestly contrary to our separation of powers. Certiorari is therefore unwarranted. But if the case merits review, it is to affirm the injunction of DAPA and thereby ensure the proper functioning of the administrative state, maintain the separation of powers, and reject petitioners' sweeping assertion of Executive authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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